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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Respondent,

—against—

SOLOMON WEISS,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment right to be tried only on indictment by a grand jury permits a court to sustain a mail fraud conviction, even though the fraudulent scheme proved by the government at trial is not the scheme set out in the indictment, because the court determines that the defendant did not suffer "substantial prejudice in his trial preparations" as a result of the post-indictment shift in prosecutorial theory.

2. Whether an employee's participation in the creation of an undisclosed corporate cash fund at the direction of the chief executive officers of the corporation, in the absence of any personal gain to the employee or misuse of the proceeds or intended or actual harm to the corporation, violates the mail fraud statute.

3. Whether a criminal jury's resort to extra-record evidence to assist it in its deliberations, in violation of the defendant's Fifth and Sixth Amendment rights, (a) is presumptively prejudicial to the defendant; (b) must affirmatively be shown by the government to have been harmless beyond a reasonable doubt; and (c) in the absence of such a showing, may be countenanced—notwithstanding the direct testimony of the jurors as to their actual need for, and reliance on, the extra-record evidence—because the trial judge satisfies herself that the record evidence would have been sufficient to support a conviction.

4. Whether, in a perjury prosecution, the Due Process Clause of the Fifth Amendment requires that the issue of materiality—an essential element of the offense—be determined by the jury rather than the court.

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OPINIONS BELOW

The opinion of the court of appeals (App. 2-37) is reported at 752 F.2d 777 (2d Cir. 1985). On February 20, 1985, the court of appeals denied petitioner's request for a rehearing and his suggestion that rehearing be *en banc*. (App. 1.) The district court's opinion is reported at 579 F. Supp. 1224 (S.D.N.Y. 1983). (App. 38-75.)

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1985. (App. 2.) On February 20, 1985, that court denied petitioner's request for rehearing and suggestion that rehearing be *en banc*. (App. 1.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Grand Jury Clause of the Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .

U.S. Const. Amend. V.

2. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for ob-

taining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. VI.

3. The mail fraud statute, 18 U.S.C. 1341, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

4. The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1962, provides:

> § *1961. Definitions.*
>
> As used in this chapter—
>
> (1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud) . . .;
>
> * * *
>
> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred

after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. . . .

§ *1962. Prohibited activities.*

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

5. The pertinent perjury statute, 18 U.S.C. § 1623, provides:

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Following a jury trial, Solomon Weiss was convicted on seven counts of a thirteen-count indictment. He was convicted of one violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) (Count 1); three violations of the mail fraud statute, 18 U.S.C. § 1341 (Counts 2-4); and three perjury violations. 18 U.S.C. § 1623 (Counts 6-8). He was acquitted of one count of mail fraud (Count 5); one count of perjury (Count 9); and four counts of tax fraud, 26 U.S.C. § 7206(2) (Counts 10-13).[1] The mail fraud convictions were the only predicate acts underlying the RICO conviction.

The indictment charging Mr. Weiss was returned on September 16, 1981. A superseding indictment was handed up shortly before trial commenced in November 1982. Mr. Weiss was charged in the indictment with a fraudulent scheme whose sole objects were to: (a) "secretly and corruptly extract and accept cash bribes in return for . . . caus[ing] Warner [Communications, Inc. (Warner)] to purchase common stock in the Westchester Premier Theatre [(WPT)]" (App. 79; Count 1, ¶ 4), and (b) "secretly and corruptly siphon and convert approximately $221,950 in checks which belonged to Warner and its shareholders" (App. 79-80; Count 1, ¶¶ 5, 6; *see also id.* at ¶ 7(c)).

The indictment charged that this conduct constituted a "scheme and artifice to defraud Warner and its shareholders [by] obtaining money from Warner and its shareholders by means of false and fraudulent pretenses" (App. 77, 82; Count 1, ¶ 3; Counts 2-5, ¶ 2) and a breach by Mr. Weiss of "fiduciary duties to Warner and its shareholders to provide

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1 At sentencing on March 13, 1984, the district court fined Mr. Weiss a total of $58,000, suspended imposition of sentence on all counts and placed Mr. Weiss on probation for five years conditioned upon his performing community service with the Essex County, New Jersey, Division of Youth Services on a full-time basis for the duration of his five-year probation. Mr. Weiss was also ordered to forfeit 14,898 shares of Warner Communications, Inc. ("Warner") stock and 359 Warner warrants, which together were worth approximately $411,939 on the date they were ordered forfeit.

honest and faithful services, undivided loyalty and to perform [his] executive obligations in good faith and exclusively in the best financial interests of Warner and its shareholders" (App. 79; Count 1, ¶ 5, 6; *see also id.* at ¶ 4).

At trial, however, the government did not argue or attempt to prove that Mr. Weiss personally accepted cash bribes or converted and siphoned Warner checks in return for causing Warner to buy WPT stock. On the contrary, the government shunned the theory that Mr. Weiss retained any of the proceeds generated by the alleged scheme (App. 99, 102). The prosecution's case was, instead, that Mr. Weiss was directed by his corporate superiors to accept cash on Warner's behalf in exchange for (i) purchasing WPT stock and (ii) issuing checks for services not actually rendered, in order to create a corporate cash fund for Warner (App. 91, 93-98, 108-110, 114-115).

The government offered no evidence as to the disposition of the proceeds of the Warner cash fund nor did it attempt to identify any of the uses to which the cash was put. The prosecutor conceded that the proceeds did not go to Mr. Weiss personally and that that they were presumptively used for the corporate benefit of Warner. (App. 133-135)[2]

The jury was instructed that it could convict Mr. Weiss of the mail fraud and RICO charges only if it found that he knowingly participated in the creation of a cash fund. The district judge stated, in her charge: "[T]he government contends that the fraudulent scheme was the creation of a cash fund at

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2 The prosecution's main witnesses against Mr. Weiss, in the grand jury and at trial, were former Warner Executive Vice President Jay Emmett and Emmett's close friend, Leonard Horwitz, once a WPT vice president and later a Warner executive. Both were convicted of felonies arising out of WPT-related prosecutions and both agreed to cooperate with the government, their sentences to be imposed following their cooperation. As part of his cooperation agreement, Emmett was permitted to avoid RICO forfeiture of $7 million worth of Warner stock which he owned. Mr. Weiss took the stand in his own defense and denied participation in any scheme. He testified that he acted on orders from Emmett, his corporate superior, with respect to specific conduct that he did not dispute. (App. 106-107.)

Warner." (App. 33; 752 F.2d at 793.) She did not charge the jury that Mr. Weiss's guilt turned on whether he had exacted bribes or converted corporate funds. Rather, she instructed that he could not be convicted on the mail fraud and RICO counts if "the government has not proven beyond a reasonable doubt that the cash fund alleged in the indictment[3] existed" because "then the government will not have proven that essential element of the crime of mail fraud." (*Ibid.*)

The jury deliberated for twenty-six hours over four days. At the end of the second day of deliberations, the jury informed the court that it was deadlocked, but the court directed that deliberations be resumed. (App. 122-123.) The verdict was returned on day five.

Throughout the deliberations, the jurors focused on determining what, in their view, Mr. Weiss knew or should have known of critical events at material times. Because the mountainous paper record before them was largely undisputed, the major issue became whether Mr. Weiss possessed the requisite "guilty knowledge". To the jurors, as disclosed in a post-trial inquiry conducted by the trial judge:

> One of the *key aspects* of deciding whether or not Mr. Weiss was guilty rested on the argument of whether or not one can reasonably expect him to know certain kinds of things.

(App. 156. *See also* App. 157, 184)

Central to the jurors' discussion was what inference, if any, could be drawn from Mr. Weiss's training as a certified public accountant ("CPA"), even though he had not practiced public accounting for over twenty years. (App. 153, 156-157, 160, 170, 184.) The problem that the jurors faced was that they were almost entirely "unfamiliar with the nature of the training of a CPA." (App. 64, 126-127, 170, 175, 191.)

At some point during the deliberations—precisely when is uncertain—one juror undertook independent research into the functions and responsibilities of certified public accountants.

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3 "Of course," as the dissent below noted, "the cash fund was nowhere alleged in the indictment." (App. 33; 752 F.2d at 793.)

(App. 149, 157, 184.) Specifically, he turned to a standard accounting text, in which he read detailed and glowing descriptions of the astuteness and professionalism with which independent CPAs perform complex auditing and other services. (App. 184-186.) He then proceeded to read or summarize to the other jurors excerpts from the textbook which purported to state the functions and responsibilities of CPAs. (App. 149-150, 153, 157, 160, 173, 184-186.)

On the third day of deliberations, the jurors addressed to the Court a question concerning CPAs which closely tracked, and cryptically cited, the textbook excerpt which had been read to them.[4] The note expressed the jurors' concern about, and effort to figure out, "basically what were the duties of a CPA." (App. 170.) The District Judge informed the jury that the record contained no evidence "as to what a CPA is" and directed them not to speculate on the subject. (App. 127.)

The jurors concluded from the Court's response that they were not going to receive any more information concerning CPAs. (App. 160.) However, "[t]he argument among jurors . . . conti[n]ued to the end of the deliberations." (App. 160, 184.) The jury returned its verdict convicting Mr. Weiss on seven of thirteen counts on the following day. (App. 131.)

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4 Their note conveying the question provided:

> "This jury has been directed to use its best unbiased judgement [*sic*] and common sense to reach a verdict on a series of counts outlined to us. Our ability to do this fairly is dependent upon our varied, collective experiences. Most of us are unfamiliar with the nature of the training of a CPA. Mr. Weiss is a CPA.
>
> "Q. Is this jury entitled to know what a CPA is, as opposed to a bookkeeper.
>
> lawyer v. legal aid[e]
>
> M.D. v. paramedic
>
> dentist v. dental tech
>
> "Re underlined (xerox) sentences. Meigs and Meigs."

Court Exh. Y (the "note") (App. 191). Although unknown to the court and counsel at the time the note was received, subsequently it was developed that "Meigs and Meigs" were the authors of the accounting textbook which the jurors consulted.

REASONS FOR GRANTING THE WRIT

Review should be granted for four reasons: *first*, to resolve serious uncertainty and conflicts among the courts of appeals concerning the substance and application of the constructive amendment doctrine under the Grand Jury Clause of the Fifth Amendment; *second*, to illuminate the parameters of the federal law of fiduciary duty as encompassed by the mail fraud statute and thereby to define the common law reach of this facially limitless criminal statute; *third*, to resolve conflicting decisions among the courts of appeals and state courts of last resort concerning the assignment and quantum of the burden of proof with respect to the harm to the defendant caused by a criminal jury's resort to extra-record evidence; and, *fourth*, to decide whether materiality, an essential element of the crime of perjury, is constitutionally required to be determined by the jury under the reasonable doubt standard.

Constructive Amendment of Indictment

1. In a series of decisions recently reaffirmed in *United States v. Miller*, 53 U.S.L.W. 4446 (U.S. April 1, 1985), this Court has repeatedly held that the exclusive test for determining whether an indictment has been constructively amended, in derogation of the Grand Jury Clause of the Fifth Amendment, is whether the defendant has been convicted of an offense whose elements "are fully and clearly set out in the indictment." *Miller*, 53 U.S.L.W. at 4447 (citations omitted). *See also id.* at 4448, 4449, 4450 (citing and quoting, *inter alia, Stirone v. United States*, 361 U.S. 212, 217 (1960), and *Ex parte Bain*, 121 U.S. 1, 10 (1886)).

Under this test, to determine whether an indictment has been constructively amended, the prosecution's trial theory and proof are juxtaposed and compared with the indictment. "[A] conviction cannot stand if based on an offense that is different from that alleged in the grand jury's indictment." *Miller*, 53 U.S.L.W. at 4449 (reaffirming in pertinent part *Bain*).

A judicial appraisal as to whether the defendant was in some factual sense "substantial[ly] prejudice[d] in his trial preparations" by a prosecutor's post-indictment change of theory forms no part of this analysis. Whether a constructive amendment occurred is determined solely by reference to the face of the indictment. If it has occurred, "prejudice" is established as a matter of law. Deprivation of "the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury . . . is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Miller*, 53 U.S.L.W. at 4448-4449, *quoting with approval, Stirone*, 361 U.S. at 217.

2. The majority decision of the court of appeals did not neutrally apply the foregoing principles. On the contrary, the majority expressly declined to do so, emphasizing its predisposition against finding any variation between the indictment and the prosecution's trial theory or proof to be a constructive amendment, absent proof of "substantial prejudice" to the defendant in preparing for trial.

> *This circuit has been reluctant to construe an alleged "shift" in the government's theory or proof as a constructive amendment* that would require reversal of a conviction "without regard to whether defendant was prejudiced by a difference between the indictment and the proof." United States v. Heimann, 705 F.2d 662, 665-66 (2d Cir. 1983). See United States v. Sindona, 636 F.2d 792 (2d Cir. 1980), cert. denied, 451 U.S. 912, 101 S.Ct. 1984, 68 L.Ed.2d 302 (1981). Rather, *this circuit has treated any differences between the indictment and the proof as variances which do not require reversal absent a showing that the variance caused substantial prejudice to the defendant*. See United States v. Knuckles, 581 F.2d 305, 312 (2d Cir.), cert. denied, 439 U.S. 986, 99 S.Ct. 581, 58 L.Ed.2d 659 (1978); Sindona, 636 F.2d at 798.

App. 26; 752 F.2d at 790 (emphasis added).

Satisfied that Mr. Weiss received "adequate notice" of the government's post-indictment change in theory, and that he

did not, as a result, suffer "substantial prejudice in his trial preparations" (App. 27; 752 F.2d at 790), the majority undertook to shoehorn the government's trial theory into the intractable fit of the indictment's language. It therefore proceeded to affirm Mr. Weiss's conviction of mail fraud, and thus RICO, for involvement in a scheme not alleged in the indictment—indeed, "the very nature of [which] . . . is significantly different from the crime charged in the indictment" (App. 33; 752 F.2d at 793) (Newman, J., dissenting).

3. The majority predicated its affirmance on a widely employed but untenable dichotomy between a "constructive amendment" of, and a mere "variance" from, an indictment. The court acknowledged that "[t]here is considerable confusion as to what constitutes a constructive amendment of an indictment as opposed to a variance of an indictment." (App. 19; 752 F.2d at 787.) This confusion has frequently been noted by the courts of appeals. *See, e.g., United States v. Cina*, 699 F.2d 853, 857-858 (7th Cir.), *cert. denied*, 104 S.Ct. 481 (1983); *United States v. Dawson*, 516 F.2d 796, 801-804, *cert. denied*, 423 U.S. 855 (1975); *United States v. Cirami*, 510 F.2d 69, 72 (2d Cir.), *cert. denied*, 421 U.S. 964 (1975); *Heisler v. United States*, 394 F.2d 692, 695-696 (9th Cir.), *cert. denied*, 393 U.S. 986 (1968) ("the progeny of *Bain* are out of joint").

4. Review is appropriate on this issue for four reasons. *First*, the majority's avowed reluctance to apply the constructive amendment doctrine and its insistence upon incorporating a "substantial prejudice" standard conflicts with the holdings of this Court in the *Miller*, *Stirone* and *Bain* cases. This conflict is not an isolated occurrence but symptomatic of a long line of Second Circuit cases (cited in the majority opinion) declining to apply the analysis of this Court most recently reaffirmed in *Miller*.

Second, the majority's insistence on employing the Second Circuit's "substantial prejudice" test is also in conflict with the uniform rule of decision in other circuits, which without exception apply the constructive amendment doctrine without regard to alleged prejudice. *See, e.g., United States v. Kelly*,

722 F.2d 873 (1st Cir. 1983), *cert. denied*, 104 S.Ct. 1425 (1984); *United States v. Crocker*, 568 F.2d 1049 (3d Cir. 1977); *United States v. Iozzi*, 420 F.2d 512 (4th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); *United States v. Bizzard*, 615 F.2d 1080 (5th Cir. 1980), *cert. denied*, 459 U.S. 973 (1982); *United States v. Cusmano*, 659 F.2d 714 (6th Cir. 1981), *cert. denied*, 104 S.Ct. 3536 (1984); *United States v. Galiffa*, 734 F.2d 306 (7th Cir. 1984); *United States v. Yeo*, 739 F.2d 385 (8th Cir. 1984); *United States v. Pazsint*, 703 F.2d 420 (9th Cir. 1983); *United States v. Griffin*, 463 F.2d 177 (10th Cir.), *cert. denied*, 409 U.S. 988 (1972); *United States v. Figueroa*, 666 F.2d 1375 (11th Cir. 1982); *Gaither v. United States*, 413 F.2d 1061 (D.C. Cir. 1969).

Third, this case presents the Court with the opportunity to eradicate the widespread confusion in the courts of appeals concerning the purported dichotomy between constructive amendments and variances. There is no constitutional foundation for this purported dichotomy under *Miller, Stirone* and *Bain*.

Fourth, as long as the Second Circuit's "substantial prejudice" test is permitted to persist, it licenses—indeed, constrains—lower courts in that circuit to engage in counter-intuitive semantic analyses of grand jury indictments in cases in which the courts perceive no such prejudice, in contravention of defendants' rights under the Grand Jury Clause of the Fifth Amendment.

5. This case also illustrates the peculiarly pernicious effects of lax enforcement of the constructive amendment doctrine in mail fraud and RICO prosecutions. These federal fraud statutes have been construed to cover an extraordinarily broad spectrum of conduct by no means apparent upon even the most painstaking reading of the statutory language.

> The current breadth of these statutes makes it *especially important that in fraud prosecutions courts vigilantly enforce the Fifth Amendment requirement that a person be tried only on the charges contained in the indictment returned by the grand jury*. A criminal statute of broad scope creates some risk that conduct will be punishable

> even though the perpetrator may have doubted in good faith that his actions fell within the coverage of the statute. To that apparently tolerable risk is added *a wholly unacceptable and unconstitutional risk when the prosecutor describes one type of actionable conduct in the indictment and then convicts the defendant for significantly different conduct.*

App. 29; 752 F.2d at 791 (emphasis added) (Newman, J., dissenting).

The indictment in this case charged Mr. Weiss with mail fraud and, derivatively, RICO. The indictment charged that the "Object of the Scheme" to defraud—the very core of criminality under the mail fraud statute—was twofold: first, that Mr. Weiss "would and did secretly and corruptly *extract cash bribes* in return for . . . caus[ing] Warner to purchase common stock in Westchester Premier Theatre"; and, second, that he "would and did secretly and corruptly *siphon and convert* . . . checks which belonged to Warner" (App. 79; Count 1 ¶¶ 4-6) (emphasis added). The indictment was bereft of any reference to a cash fund or to any scheme to receive or generate cash on behalf of Warner.

The plain language and import of the indictment was that Mr. Weiss was a faithless employee engaged in a scheme to enrich himself at Warner's expense. It explicitly charged him with a scheme "for obtaining money from Warner and its stockholders." (App. 77; Count 1, ¶ 3.) At trial, however, the government abandoned this personal enrichment scheme of bribery and conversion, and eschewed the theory that Mr. Weiss obtained any cash from the company or its stockholders (App. 99, 102).

Instead, in the prosecutor's opening statement and for the first time, a wholly different scheme was charged: that, at the direction of his corporate superiors, Mr. Weiss helped to create a corporate "cash fund" for Warner. (App. 91-92.) The cash that the indictment had accused Mr. Weiss of pocketing was described throughout the trial as having been received by him "on behalf of Warner". (App. 91-92.) To cement the change in theory, the jury was charged that the existence of the cash

fund was a *sine qua non* of conviction, and it was *not* instructed that it was required to find the elements of bribery or conversion in order to convict. (App. 116.)

The prosecution's substitution at trial of the "cash fund" scheme for the indictment's bribery and conversion scheme was, in *Stirone*'s words, "neither trivial, useless, nor innocuous. . . . [Rather, it] destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Miller*, 53 U.S.L.W. at 4448-4449, *quoting with approval, Stirone*, 361 U.S. at 217 (citations omitted). In the words of the dissenting Second Circuit judge:

> A corporate official indicted for a scheme to extract bribes and convert corporate funds has a constitutional right not to be convicted unless a jury is told that he must be proven beyond a reasonable doubt to have extracted bribes or converted corporate funds. *He cannot be convicted of a scheme to add to a corporate cash fund when the indictment against him contains no allegations of such conduct.* The distinction between the scheme alleged in the indictment and the scheme for which the jury convicted is too fundamental to be ignored. The accusation that Weiss extracted bribes is plainly an allegation that he pocketed money as the price for being influenced in his job. *Yet it is undisputed that he did no such thing.*

App. 33-34; 752 F.2d at 793 (emphasis added) (Newman, J., dissenting).

The prosecution in the present case made no effort to prove the elements of bribery or conversion, which were the exclusive objects of the scheme charged in the indictment. In fact, it affirmatively proved that Mr. Weiss committed neither bribery nor conversion. For example, to prove bribery, it was incumbent upon the prosecution to establish, *inter alia*, (1) that a payment was paid to Mr. Weiss, as an employee, without the knowledge or consent of his employer, *see, e.g., American Distilling Co. v. Wisconsin Liquor Co.*, 104 F.2d 582, 585 (7th Cir. 1939); N.Y. Penal Law §§ 180.00, 180.03, 180.05 (McKinney Supp. 1984), and (2) that the bribe inured to his personal advantage, not the company's, *American Distilling*, 104 F.2d at

585; *People v. Adams*, 86 Misc.2d 634, 382 N.Y.S.2d 879 (1976). Similarly, the conversion charge required proof, among other things, that Mr. Weiss's actions were unauthorized by his superiors. *See, e.g., United States v. Paladin*, 539 F. Supp. 100, 103 (W.D.N.Y. 1982).

The prosecution, however, proved that Warner's top executives knew, authorized and consented to—indeed, directed—Mr. Weiss's actions, and that he did not personally benefit from any of the transactions. In addition, the government did not attempt to prove that the proceeds of the cash fund were used for anything other than *bona fide* corporate purposes. Rather, it conceded the proceeds were presumptively used for proper corporate purposes. (App. 134-135.) There is no known definition of "bribery" or "conversion," however expansive, that encompasses such conduct. *See generally* J. Noonan, BRIBES xi, xx-xxiii, 578-579, 588, 596 (1985).

The panel majority acknowledged these proof failures and theory variations with the observation that "the use of the words 'bribery' and 'conversion' may not have comported with their textbook definitions." (App. 23; 752 F.2d at 788.) However, it sought to bolster its variance analysis by applying a "totality of the evidence" test under which the government's change in theory was excused because: (1) the means of accomplishing the fraudulent scheme as proved at trial (the creation of "fake invoices," and the like) were the same means alleged in the indictment and (2) the prosecutor persisted in "characteriz[ing] the allegedly fraudulent transactions in these ['bribery' and 'conversion'] terms throughout the trial." (App. 22-23; 752 F.2d at 788.)

This approach, however, reflects at best a fundamental confusion between the *means* of accomplishing a fraudulent scheme and the *scheme itself*. In the indictment, the bribery and conversion allegations comprise the entirety of the charged scheme. The majority disregarded those scheme allegations and looked solely to the underlying evidence of *means* set forth in the indictment to affirm Mr. Weiss' conviction for having participated in a *different* fraudulent scheme. It thereby overlooked the pervasive change in the prosecution's case.

As Judge Newman observed in dissent:

> The *core allegation* of the RICO and the predicate mail fraud counts against Solomon Weiss *was his participation in a scheme to defraud*. The scheme charged in the indictment was a scheme to extract bribes and convert corporate checks. The scheme for which Weiss stands convicted, however, was a scheme to create a cash fund for his corporate employer. Since the alleged extraction of bribes and conversion of corporate funds were alleged to be in breach of the defendant's fiduciary duties to his corporate employer, *the plain implication of the indictment is that the bribery and conversion were accomplished to the detriment of the corporation*. However, creation of the cash fund, for which Weiss was convicted, was indisputably for the benefit of the corporation. The two schemes are fundamentally different in their nature and their effect. *They may even be different in their criminality, since bribery and conversion of corporate funds are undoubtedly unlawful, whereas creation of a cash fund for a corporation's benefit may not be.*

App. 29-30; 752 F.2d at 791 (emphasis added).[5]

Strikingly, if the bribery and conversion allegations—not proved at trial—were to be pruned from the indictment, the remaining allegation of a fraudulent scheme would merely track the language of the mail fraud statute. Such an indictment would be insufficient as a matter of law. "[A]n indict-

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5 Moreover, the majority's acquiescence in the makeweight government argument that the cash fund was a "shorthand expression" for the fraudulent scheme or "simply traced the proceeds" of the illegal scheme (App. at; 752 F.2d at 789) suffers from similar defects. The bribery and conversion scheme alleged in the indictment—the charge that Mr. Weiss "obtain[ed] money from Warner and its stockholders"—plainly meant, and necessarily entailed, that the proceeds inured to the benefit of Mr. Weiss. In contrast, the cash fund scheme plainly meant, and the government explicitly conceded, that the proceeds never inured to the benefit of Mr. Weiss but remained with his corporate employer. To view the cash fund as a "short hand expression" the majority had to reach a tortured and counter-intuitive interpretation of the indictment's language. The dissent, in contrast, reads the indictment as it is written, "plainly charg[ing] that Weiss, not Warner, ended up with the $170,000 cash." (App. at 31; 752 F.2d at 792)

ment must do more than simply repeat the language of the criminal statute." *Russell v. United States*, 369 U.S. 749, 764 (1962).[6]

The constitutional provision that a trial may be held in a serious federal criminal case only if a grand jury has first intervened "reflects centuries of antecedent development of common law, going back to the Assize of Clarendon in 1166." *Russell v. United States*, 369 U.S. at 761. The 800-year history of this requirement reflects the fundamental nature of this protection of the individual from "hasty, malicious and oppressive persecution" by "standing between the accuser and the accused." *Wood v. Georgia*, 370 U.S. 375, 390 (1962).[7]

In *Russell*, this Court stressed the identity of the constitutional deprivations occasioned by an insufficient indictment and those occasioned by a constructive amendment of an indictment. 369 U.S. at 770-71. The Court highlighted the importance of the constructive amendment doctrine in ensuring the fulfillment of the explicit constitutional guarantee of indictment by a grand jury:

> *Any other doctrine would place the rights of the citizen*, which were intended to be protected by the constitutional provision, *at the mercy or control of the court or prosecuting attorney*; for, if it be once held that changes can be

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6 "Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *United States v. Hess*, 124 U.S. 483, 487. *See also Pettibone v. United States*, 148 U.S. 197, 202-204; *Blitz v. United States*, 153 U.S. 308, 315; *Keck v. United States*, 172 U.S. 434, 437; *Morissette v. United States*, 342 U.S. 246, 270 n. 30.

Russell, 369 U.S. at 765. *See also United States v. Hess*, 124 U.S. 483 (1888) (mail fraud indictment that merely parrots language of statute is insufficient).

7 *See also Hale v. Henkel*, 201 U.S. 43, 59 (1906). *See generally* Note, *The Grand Jury as an Investigatory Body*, 74 Harv. L. Rev. 590 (1961); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1170 (1960); McClintock, *Indictment by Grand Jury*, 26 Minn.L.Rev. 153, 156 (1942); R. Younger, The People's Panel (1963); 1 W. Holdsworth, History of English Law (1927).

> made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists." Ex parte Bain, supra, at 10, 13. We reaffirmed this rule only recently, pointing out that "*The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.*" Stirone v. United States, supra, at 218.

Russell, 369 U.S. at 771 (emphasis added).

In the present case, as in *Russell*, the "cryptic form of indictment . . . requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." *Id.* at 766. That is not, in this case as in *Russell*, constitutionally permissible.

The majority of the court of appeals, however, was not simply analyzing the record to determine whether the "trial evidence had 'amended' the indictment by *broadening* the possible bases for conviction from that which appeared in the indictment, as this Court's opinions require." *Miller*, 53 U.S.L.W. at 4448 (summarizing the holding of *Stirone*) (Court's emphasis). Rather, with its misplaced focus, the majority was conducting an excursis to discern from the appellate record whether Mr. Weiss had, in its view, received "adequate notice" of the government's change in theory to avoid "substantial prejudice in his trial preparations." (App. 27; 752 F.2d at 790-791.) It is undisputed that the defense was never apprised of the cash fund theory prior to trial. However, the majority inferred that Mr. Weiss had "adequate notice of the charges against him" (App. 27; 752 F.2d at 790) for three reasons: (1) because trial counsel for Mr. Weiss did not object to the government's introduction of the cash fund theory at trial; (2) because ten months before trial the prosecution

notified Mr. Weiss "that it would not claim that he had kept any of the money for his own personal use;" and (3) because Mr. Weiss took the stand in his own defense and denied receipt of the cash. (App. 26-27; 752 F.2d at 790.)

Yet none of these ostensible "substantial prejudice" rationales has any vitality under the holdings in *Miller*, *Stirone* and *Bain*. Trial counsel's failure to object to the cash fund theory when it was proffered for the first time at trial neither justifies nor excuses the derogation of Mr. Weiss's substantial right to be tried only on charges presented in an indictment returned by a grand jury. "Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Stirone*, 361 U.S. at 217 (citations omitted), *quoted with approval* in *Miller*, 53 U.S.L.W. 4449. Similarly, the prosecutor's pretrial disavowal, in an informal bill of particulars, of any claim that Mr. Weiss personally kept the cash did not apprise the defense of the cash fund theory nor, of course, did it constitute a superseding indictment sufficient to amend that returned by the grand jury.[8] "[A] bill of particulars cannot save an invalid indictment." *Russell v. United States*, 369 U.S. at 770. Finally, Mr. Weiss's exercise of his right to take the stand in his own defense certainly does not divest him of his rights under the Grand Jury Clause of the Fifth Amendment.[9]

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8 A superseding indictment was returned in this case shortly before trial—and Mr. Weiss was tried on that superseding indictment—but the alleged "Objects of the Scheme" to defraud (*viz.*, bribery and conversion) were not amended, and the cash fund theory was never disclosed.

9 The majority's misplaced "substantial prejudice" focus is also factually misguided. In fact, the defense was substantially prejudiced by the prosecution's pretrial concealment of the cash fund theory. Ignorant of the theory until the government's opening statement, the defense was totally precluded from preparing a factual defense on this claim. The prejudicial effect of this preclusion is no mere theoretical possibility. The defense could have produced abundant evidence as to the non-existence of the government-touted "Warner cash fund." Even the government's star witness, Warner Executive Vice President Jay Emmett (who later became President of the Company), admitted that he never heard of the Warner cash fund at any time during his career at Warner, except for the one sentence reference to it in 1973 made by Warner's Chairman of the Board, to which Emmett testified at trial.

As Judge Newman observed in dissent:

> The various arguments advanced [by the majority] to excuse or mitigate the fundamental switch from the crime charged to the crime proved are unavailing. *Whether Weiss was surprised or prejudiced, or was himself at fault for not objecting to the prosecutor's opening, the evidence, or the jury charge, is all beside the point because a constructive amendment of an indictment is the "[d]eprivation of such a basic right" that it cannot be "dismissed as harmless error."* Stirone v. United States, supra, 361 U.S. at 217. Weiss does not complain of overreaching argument, inadmissible evidence, or an incorrect statement of the law in the charge; his point is that the notice requirement of the Fifth Amendment has been violated. It is the totality of the trial that demonstrates the correctness of his position.

App. 35; 752 F.2d at 794 (emphasis added).

The panel majority's "reluctan[ce]" to apply the constructive amendment doctrine is inconsistent with the holdings of this Court and the other courts of appeals, it reflects the admitted "confusion" of the untenable dichotomy between constructive amendments and variances which remains in common use, and it sanctions relieving the government of its burden of proving the crime charged in the indictment. It should not be permitted to stand.[10]

Mail Fraud

1. For two centuries, it was black letter law that there is no federal common law of crimes. *See, e.g., United States v. Hudson & Goodwin*, 7 Cranch 32, 32-33 (1812); *United States v. Eaton*, 144 U.S. 677, 687 (1892); *Donnelly v. United States*, 276 U.S. 505, 511 (1928); *D'Oench, Duhme & Co., Inc. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 468-469 & n. 7 (1942) (Jackson, J., concurring).

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10 At the very least, in view of the irreconcilable conflict between the majority opinion below and this Court's opinion in *Miller*, the court of appeals judgment should be vacated and the case remanded on this point alone.

In the last decade, however, the courts of appeals have progressively broadened the scope of the mail fraud statute to reach conduct previously considered perhaps unethical but never criminal prior to the verdicts of conviction in the cases coming before them. *See, e.g., United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (governor's undisclosed arrangement to purchase racetrack stock at below market prices from owner of racing interests in return for agreeing to promote interests before state racing board and state legislature violates mail fraud statute); *United States v. Bryza*, 522 F.2d 414 (7th Cir. 1975), *cert. denied*, 426 U.S. 912 (1976) (employee's failure to disclose receipt of kickbacks to employer, even though the defendant secured best possible deal for his employer, constitutes mail fraud); *United States v. Bronston*, 658 F.2d 920 (2d Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) (lawyer's nondisclosure of his conflict of interest to firm client, absent any proof that the lawyer abused his fiduciary relationship with the client, violates mail fraud statute); *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) (nondisclosure by local political party chairman who held no public office that he had received a set percentage of commissions from insurance brokers doing business with town and county constitutes breach of fiduciary duty owed to general citizenry and thus mail fraud).

2. This case presents the Court with the most expansive construction given the mail fraud statute by any court to date—a construction whose validity the panel majority itself considered to be a "close question" (App. 12; 752 F.2d at 784). Mr. Weiss was convicted of mail fraud for participating, at his superiors' direction, in the creation of a corporate cash fund that was not shown, and not found, to have been used for any noncorporate, or even improper, purpose. Indeed, the prosecution conceded that the cash fund's proceeds were presumptively used for *proper* corporate purposes (App. 134-135).

There was, moreover, no evidence that the cash fund scheme contemplated or caused any harm or injury to Warner or its stockholders. Nor was there any claim, and the court of

appeals did not conclude, that the creation of the cash fund, as such, was unlawful.[11] Rather, Mr. Weiss—an assistant treasuer of Warner with no reporting obligations under the federal securities laws and no opportunity in fact to communicate with Warner shareholders—was taxed with criminal liability for having failed to disclose the existence of the cash fund to Warner's shareholders. (App. 14; 752 F.2d at 785.)

The panel majority acknowledged that:

> Appellant's argument that he did not violate the mail fraud statute because his creation of the cash fund was not illegal, was not intended to harm Warner or its shareholders, and did not lead to any personal gain presents a close question.

App. 12; 752 F.2d at 784. Nonetheless, analogizing the present case to the Second Circuit's earlier decision in *United States v. Siegel*, 717 F.2d 9 (2d Cir. 1983), the majority stated that the jury "could reasonably have concluded that the disbursement of corporate funds for fake feasibility studies and fake invoices for non-rendered services established non-corporate use of the funds." (App. 13-14; 752 F.2d 784-785.) This statement ignores, however, that the jury was never called upon to reach such a conclusion and never in fact did so.

Unlike *Siegel*, in which the jury was instructed that it could find a fraudulent scheme if it found that the defendants were engaged in accumulating cash for the purpose of "bribes and self-enrichment," 717 F.2d at 16, the jury in the instant case was instructed only that it need find the creation of a cash fund to convict. Given the government's concessions (1) that Mr. Weiss did not use the fund for purposes of self-enrichment and (2) that the fund was presumptively used for Warner's corporate benefit, the jury was not given the opportunity to—and did not—determine that the evidence established noncorporate

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11 The conduct charged by the prosecution antedated enactment of the Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977), Title I of which was enacted precisely because "falsification of corporate books and records" was not theretofore illegal. *See* Senate Comm. on Banking, Housing and Urban Aff., *Foreign Corrupt Practices And Domestic And Foreign Investment Improved Disclosure Acts of 1977*, S. Rep. No. 114, 95th Cong., 1st Sess. at 1-2, 3, 7 (1977).

use of the funds. The government never argued the point and the jury was never asked to infer it. Accordingly, the crucial finding—that the cash fund was devoted to noncorporate purposes—was not submitted to, nor made by, the jury. As summarized by the dissent:

> The essence of assembling a corporate cash fund, if such be unlawful, is the breach of a fiduciary's obligation to make material disclosures, an obligation that we have held violates the mail fraud statute in this context *only* when it is proven that the funds were used for noncorporate purposes.

App. 34-35; 752 F.2d at 794 (emphasis added) (citing *Siegel, supra*, 717 F.2d at 714).

Absent a jury finding that the cash fund was used for noncorporate purposes, the majority opinion has sustained a mail fraud conviction even though the government did not establish the existence of a scheme that contemplated, much less caused, actual harm or injury. Mr. Weiss's conviction was predicated solely upon falsification of certain documents prior to the enactment of the Foreign Corrupt Practices Act and arranging for *de minimis* payments to be made for consideration, albeit not the consideration for which they were ostensibly made. No court has previously held that a corporate employee acting in furtherance of his corporation's interest, even if the acts involve questionable conduct, commits mail fraud because, in hindsight, the corporation ultimately suffers an immaterial financial loss (in this case, due to the subsequent drop in value of WPT stock). Nor has any court held that an employee breaches any duty of providing "honest and faithful services, undivided loyalty" to his employer by acting at the direction of the corporation's chief executive officers presumptively to further the corporation's interests, in a manner not designed or intended to result in any personal gain.

3. Review is appropriate in this case to permit the Court to delineate the parameters of the federal law of fiduciary duty insofar as it is encompassed by the mail fraud statute and to provide guidance to the lower courts concerning the reach of

this statute, which "is seemingly limitless on its face." *United States v. Margiotta*, 688 F.2d at 120. Appropriate boundaries should be set on the government's inexorable incursions into internal corporate decisionmaking, and the limits of criminalization under the mail fraud statute should be defined.

Jury Misconduct in Procuring Extra-Record Evidence

1. This case also presents the Court with the opportunity to set the standards, and to assign and prescribe the burden of proof, governing the determination whether a criminal jury's consideration of extra-record evidence has irretrievably tainted the defendant's trial. This is an issue on which the courts of appeals and state courts of last resort are split, based upon at least three conflicting readings of this Court's opinions in *Remmer v. United States*, 347 U.S. 227 (1954), and *Smith v. Phillips*, 455 U.S. 209 (1982).

Both *Remmer* and *Phillips* dealt with what generically may be termed "jury taint," although neither directly concerned a jury's procuring and considering extra-record evidence. In *Remmer*, a tax evasion prosecution, an unknown third party approached a juror during the trial "and remarked to him that he could profit by bringing in a verdict favorable to the petitioner." 347 U.S. at 228. Without a hearing or any notice to the defense, the district judge and the prosecutor arranged an FBI investigation and determined that the improper conduct was inconsequential. The trial proceeded uninterrupted and the defendant was convicted, unaware until sometime subsequent that the incident had occurred.

This Court vacated the judgment and remanded to the district court with directions to hold a hearing to determine whether the incident was harmful to the defendant. The Court held that:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed *presumptively prejudicial*, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties.

347 U.S. at 229 (emphasis added). This Court further held that, while the presumption is not conclusive, "*the burden rests heavily upon the Government* to establish . . . that such contact with the juror was harmless to the defendant." *Ibid.* (emphasis added).

Smith v. Phillips, in contrast, involved a juror's applying for employment as a felony investigator with the prosecuting attorneys' office during the course of defendant's murder trial. Although the prosecutors were aware of the application before the trial concluded, they did not apprise the trial court or the defense until after the verdict of conviction was rendered. 455 U.S. at 212-213. At a post-trial hearing, the trial judge concluded that the incident had not deprived the defendant of a fair trial. *Id.* at 213-214.

Reviewing a lower federal court's grant of habeas corpus relief, this Court reversed on a variety of grounds not immediately applicable to the present case. The issue before this Court was not the appropriate standard of proof required to demonstrate that jury misconduct is harmless. However, in a pertinent passage which has generated confusion among the courts of appeals, this Court introduced its discussion of *Remmer* with the statement:

> This Court has long held that the remedy for allegations of juror partiality is a hearing in which *the defendant has the opportunity to prove actual bias.*

455 U.S. at 215 (emphasis added).

2. Since *Phillips*, the courts of appeals and state courts of last resort have split as to (a) whether the "presumptively prejudicial" standard still applies in jury taint cases; (b) whether it is the prosecution or the defense that now bears the burden of proving the impact on the jury—and the fairness of the trial—of extra-record evidence; and (c) precisely what that burden is.

In *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 906 (1985), the Sixth Circuit read *Phillips* as holding that *Remmer* no longer governs the question of the burden of proof but "only controls the question of

how the district court should proceed . . . *i.e.*, a hearing must be held . . . ." *Id.* at 532. The Sixth Circuit declared that:

> In light of *Phillips*, the *burden of proof rests upon a defendant* to demonstrate that unauthorized communications with jurors resulted in *actual* juror partiality. *Prejudice is not to be presumed.*

Id. at 532 (emphasis added). The First Circuit has held, to the same effect, that *Phillips* overruled *Remmer*'s "presumptively prejudicial" standard and that the burden is now on the defendant to prove actual prejudice. *United States v. DeLutis*, 722 F.2d 902, 909 (1st Cir. 1983).

The Ninth Circuit, in contrast, has rejected this analysis of *Phillips* and reaffirmed its view that, under *Remmer*, the injection of extra-record matter into jury deliberations remains "presumptively prejudicial;" that the government continues to bear the burden of proof, and that this burden is to "prove beyond a reasonable doubt that the juror's reading of [extra-record evidence] was harmless." *United States v. Littlefield*, 752 F.2d 1429, 1432 (9th Cir. 1985). The Third Circuit and the Supreme Courts of Wisconsin and Connecticut also hold that the "presumptively prejudicial" standard remains applicable and that the government bears the burden of proving harmlessness beyond a reasonable doubt. *Government of Virgin Islands v. Joseph*, 685 F.2d 857, 864 (3d Cir. 1983); *State v. Poh*, 116 Wis. 2d 510, 343 N.W.2d 108, 116-118 (1984); *State v. Asherman*, 193 Conn. 695, 478 A.2d 227, 251-254 (1984), *cert. denied*, 53 U.S.L.W. 3668 (1985).

Six courts of appeals, including the court below, have affirmed the vitality of the "presumptively prejudicial" standard and acknowledged that the burden of proof is on the government to make "an affirmative showing . . . that the [extra-record] information is harmless," but—unlike the four courts just discussed—they do not require that the burden be borne beyond a reasonable doubt. App. 9; 752 F.2d at 783. *See also United States v. Barnes*, 747 F.2d 246, 250-251 (4th Cir. 1984); *Owen v. Duckworth*, 727 F.2d 643, 646 (7th Cir. 1984); *United States v. Delaney*, 732 F.2d 639, 642 (8th Cir. 1984); *Rinker v. County of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983) ("[r]ebuttal requires a strong contrary showing"); *Hobson v.*

Wilson, 737 F.2d 1, 47 (D.C. Cir. 1984) ("a presumption of prejudice arises that is rebuttable only by a strong contrary showing"). Additionally, the Tennessee and Ohio courts apply the same rule. *State v. Blackwell*, 664 S.W.2d 686, 689 (Tenn. 1984); *State v. King*, 10 Ohio App.3d 161, 460 N.E.2d 1383, 1388, *leave to appeal denied*, No. 83-1283 (Sept. 21, 1983).

3. Only the "presumptively prejudicial" standard, coupled with the placement on the prosecution of the burden of proving harmlessness beyond a reasonable doubt, is consistent with this Court's holdings in *Remmer*, *Chapman v. California*, 386 U.S. 18 (1967), and the long line of cases constitutionally mandating that a criminal defendant's guilt or innocence be adjudicated only upon the evidence properly introduced at trial.

The *Chapman* doctrine imposes upon the prosecution—"the beneficiary" of any constitutional error in the receipt of evidence or comments at trial—the burden of proving harmlessness beyond a reasonable doubt. 368 U.S. at 23-24. This doctrine has consistently been applied by this Court in the context of Fifth and Sixth Amendment violations in criminal cases. *See, e.g.*, *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (Sixth Amendment right to counsel); *Harrington v. California*, 395 U.S. 250, 251-254 (1969) (Sixth Amendment confrontation right); *Fontaine v. California*, 390 U.S. 593, 596 (1968) (Fifth Amendment privilege against self-incrimination).

That a criminal jury's resort to extra-record evidence during deliberations constitutes grave constitutional error is beyond dispute. It is a fundamental precept of our criminal justice system that the "conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). This principle is grounded in the defendant's Sixth Amendment rights of confrontation and cross-examination and his Fifth Amendment right to due process. *Parker v. Gladden*, 385 U.S. 363, 365 (1966). As this Court held in *Turner v. Louisiana*, 379 U.S. 472, 472-473 (1965):

> In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that *the "evidence*

> *developed" against a defendant shall come from the witness stand in a public courtroom* where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.

(Emphasis added.)

Without the benefit of judicial supervision and the strictures imposed by the rules of evidence, there can be no assurance that extra-record matter that comes before a jury is probative, admissible or not substantially outweighed by prejudice to the defendant. Moreover, the constitutional guarantees of confrontation and cross-examination are so vital to testing the accuracy of trial evidence that their absence "calls into question the ultimate 'integrity of the fact-finding process.'" *Ohio v. Roberts*, 448 U.S. 56, 64 (1980), *quoting*, *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

4. The prosecution certainly did not prove beyond a reasonable doubt that the jury's resort to extra-record evidence in this case was harmless. The jury was seriously troubled during several days of deliberations. It was confronted with an avalanche of documents, which were essentially neutral on their face, and a direct conflict between the testimony of Mr. Weiss and his accusers, the felons Horwitz and Emmett, as to what the documents signified. It sent a total of 14 substantive notes to the district court, its deliberations consumed approximately 26 hours over four days, and it deadlocked halfway through the process (App. 122).[12]

The jurors considered the question of Mr. Weiss's "guilty knowledge"—or lack thereof—to be critical to a determination of his innocence or guilt, but they were unable to decide that question on the evidence before them. They considered the inferences to be drawn from Mr. Weiss's CPA status to be

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12 In *Parker v. Gladden*, 385 U.S. at 365, this Court dismissed the prosecution's suggestion that there was no prejudice to the defendant in a bailiff's commenting to jurors that the defendant was guilty, stressing, *inter alia*, that—in that case as in this—"the jurors deliberated for 26 hours, indicating a difference among them as to the guilt of petitioner."

crucial to that determination. (App. 153, 156-157, 160, 170, 184.) But they were admittedly ignorant of what inferences as to Mr. Weiss's knowledge or intent could be drawn from that CPA status. (App. 64, 126-127, 170, 175, 184). Moreover, the government has conceded, and the district court found, that there was no evidence in the record as to the nature and functions of certified public accountants (App. 63, 125).

As a result, the jurors deemed it necessary to obtain extra-record evidence on this score. The very fact that the jury believed extra-record evidence to be a necessity is indicative of serious prejudice to Mr. Weiss. *Gibson v. Clanon*, 633 F.2d 851, 855 (9th Cir. 1980), *cert. denied*, 450 U.S. 1035 (1981) (new trial ordered notwithstanding that the prosecution's case was "a strong one").

Furthermore, the extra-record matter to which the jury turned was apparently authoritative in nature and seemingly resolved the fact question to which they required an answer. Ostensible authoritativeness compounds the damage. *See Gibson*, 633 F.2d at 853-854 (new trial ordered where jurors consulted encyclopedia); *Paz v. United States*, 462 F.2d 740, 745 (5th Cir. 1972) (case remanded where drug prosecution jurors consulted two books concerning drug trafficking).

Finally, the extra-record evidence was of dubious admissibility and clearly was not admissible without cautionary and limiting instructions of the sort that the district court stated it would have given had the material actually been offered into evidence (App. 64-65 and n. 34). The deliberations were therefore tainted with extra-record matter which was not, and could not properly have been, before the jury in the fashion it was, nor used for the purposes for which it was used.

In so close a case, the impermissible injection of extra-record evidence to resolve a fact question that the jury deemed crucial, prejudiced Mr. Weiss and violated his Fifth and Sixth Amendment rights. The jurors' direct testimony precludes any finding that this constitutional error was harmless beyond a reasonable doubt, and no such finding was made. Review, and remand for a new trial, are appropriate.

5. Finally, this case presents the Court with a serious misapprehension as to the proper methodology for assessing the harm of jury taint, whatever be the burden of proof, and a conflict between two courts of appeals on this subject.

The district court[13] acknowledged that the juror contamination question before it was "a difficult one" and "very close" (App. 62, 66). Further, the district court rightly rejected the government's arguments that the extra-record evidence before the jury was either (a) cumulative of evidence in the record; (b) within the common knowledge of the jurors; (c) permissibly relied upon because it might have been admissible had the government offered it (since in such circumstances the district court would have admonished the jury as to the limited uses to which such evidence might properly be put); or (d) the subject of any curative instruction to the jury (App. 63-65).

However, the district court proceeded to ignore the direct testimony of the jurors as to the insufficiency of the record evidence and their consequent need to resort to the apparently authoritative accounting textbook to resolve "[o]ne of the key aspects of deciding whether or not Mr. Weiss was guilty." It engaged instead in an exegetical analysis of the record to determine what evidence the jury might have, but did not, content itself with. Because the district court determined there to be sufficient evidence in the record to sustain a conviction, it declined to set aside the verdict. (App. 65-66.)

The question before this Court, therefore, is whether the jurors' testimony as to their actual need for, and reliance on, the extra-record evidence may properly be disregarded in resolving the question of prejudice to the defendant—that is, whether a judicial analytic exercise may properly be substituted for the jurors' unequivocal testimony. The Fourth Circuit has expressly rejected the view, adopted by the court below, that the sufficiency of the record evidence excuses the prejudice introduced by the jury's consideration of extra-record evi-

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13 With respect to methodology, the panel majority deferred entirely to the district court (App. 10; 752 F.2d at 783), whose analysis must be scrutinized.

dence. *United States v. Barnes*, 747 F.2d at 249. It is respectfully submitted that, if the constitutional safeguards are to have any prophylactic effect and the "presumptively prejudicial" standard to have any meaning, direct evidence of actual prejudice must be dispositive. Consequently, certiorari should be granted to establish this methodology and resolve the conflict between the courts of appeals.

Materiality of Perjury as a Jury Issue

It is beyond dispute that the Constitution requires the prosecution to prove every element of the crime charged beyond a reasonable doubt to the satisfaction of the jury. *Sandstrom v. Montana*, 442 U.S. 510, 520-523 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422, 435, 446 (1978); *Mullaney v. Wilbur*, 421 U.S. 684, 697-700 (1975); *In re Winship*, 397 U.S. 358, 364 (1970); *Morissette v. United States*, 342 U.S. 246, 274-275 (1952).

It is equally incontrovertible that materiality is an essential element of the crime of perjury. The statute proscribes only "false *material* declaration[s]." 18 U.S.C. § 1623(a) (emphasis added). Accordingly, it is respectfully submitted that the issue of materiality constitutionally must be determined by jury verdict.

As the court below observed, the rule of decision in the federal courts—without guidance from this Court—has been to the contrary. (App. 17; 752 F.2d at 786.) Certain state courts, however, applying various analyses, have determined that the materiality of perjury is necessarily a jury question. *See, e.g., People v. Clemente*, 285 App.Div. 258, 262, 136 N.Y.S.2d 202, 205-206 (1st Dep't 1954), *aff'd*, 309 N.Y. 890, 131 N.E.2d 294 (1955); *Commonwealth v. McDuffee*, 379 Mass. 353, 398 N.E.2d 463, 469 (1979); *Cox v. State*, 13 Ga.App. 687, 79 S.E. 909 (1913).

Moreover, the federal cases which hold that materiality is a question for the court rest upon an antiquated precedent of dubious reliability, *Sinclair v. United States*, 279 U.S. 263 (1929). *Sinclair*, which did not even involve a prosecution for perjury (but criminal contempt of Congress) is no longer sound

authority because the cases upon which it relied—*Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894), and *Horning v. District of Columbia*, 254 U.S. 135 (1920)—have effectively been overruled.[14]

Notably, materiality as an essential element of other offenses is recognized to be a jury question.[15] These other offenses include tax fraud. *United States v. Null*, 415 F.2d 1178 (4th Cir. 1969). Significantly, the instant case included four counts of alleged tax fraud. On those counts, the jury was obviously concerned with the issue of materiality because it expressly requested an instruction from the court on that question during the course of deliberations. (App. 129-130.) Ultimately, the jury acquitted Mr. Weiss on all of the tax fraud counts.

This case provides an excellent opportunity for this Court to decide the materiality issue. In as close a case as that before this Court, and particularly in light of the jury's demonstrated concern with materiality in the tax fraud context, the prejudice to Mr. Weiss resulting from the district court's failure to submit the materiality issue to the jury is apparent. It is respectfully submitted that the district court was correct when it articulated the view that it "is a serious infringement on the right of a jury trial in a criminal case" to withdraw the issue of

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14 *Brimson* was effectively overruled by *Bloom v. Illinois*, 391 U.S. 194 (1968), which precluded imprisonment for a serious criminal contempt without a jury trial. The holding in *Horning* that a trial judge may instruct the jury that the facts in a criminal case are undisputed is clearly invalid in light of this Court's decisions in *Sandstrom*, *United States Gypsum Co.*, *Mullaney* and *Winship*. *See United States v. Hausmann*, 711 F.2d 615 (5th Cir. 1983) (recognizing the force of the argument "that *Sinclair* . . . violate[s] the cardinal principle that a trial court in a criminal case may never direct a verdict on any essential element of an offense").

15 Many courts, for example, hold materiality to be a jury issue under 18 U.S.C. § 1001, which governs the making of false statements to a United States agency. *See, e.g., United States v. Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979). Materiality is also a jury question in the context of securities laws violations. *See, e.g., TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976); *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981), *aff'd in part, rev'd in part on other grds.*, 459 U.S. 375 (1983).

a purported perjury's materiality from the jury and not to require the prosecution to prove that "element of the crime beyond a reasonable doubt" (App. 104).[16] Mr. Weiss's perjury convictions should therefore be reversed and remanded for a new trial to permit a jury determination on the issue of materiality.

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16 The trial court, although sympathetic to Mr. Weiss's contention, felt constrained by Second Circuit precedents to take the materiality issue from the jury. She stated:

> I am an inferior court and am aware of the obligations of an inferior court to obey clearly the delineated rule of the Circuit, and I will do that. But for the record I am certainly going to say that I am doing it because of my judicial obligation and not because I am convinced that its an appropriate ruling, and I would certainly encourage Mr. Kasanof [defense counsel] in the event that there is a conviction that this matter be appealed all the way up to the United States Supreme Court where they can directly confront an issue as this, *which I feel is a serious infringement on the right of a trial jury in a criminal case* to determine whether or not the government has proven each and every element of the crime beyond a reasonable doubt.

(App. 104 (emphasis added)).

CONCLUSION

For each of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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